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SUPREME COURT OF THE STATE OF WASHINGTON

Jesus Quezada,

Defendant/Appellant,

v.

The City of Seattle,

Plaintiff/Respondent.

CITY OF SEATTLE'S SUPPLEMENTAL BRIEF

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I. SUPPLEMENTAL ARGUMENT

Quezada argues the decision in *City of Seattle v. Quezada*, 142 Wn.App. 43, 174 P.3d 129 (2007), is novel and unfair. We summarize below our arguments upon the legal and equitable issues raised below and in his petition.

A. The defined term “prior offenses” cannot be redefined by extracting the individual words from the defined term and relying upon the common meaning of the individual terms to create ambiguity and conflict.

The court of appeals concluded that construing the terms “prior offenses” and “within seven years” were central to resolving this sentencing dispute. This conclusion reflects the two essential components in RCW 46.61.5055 for DUI mandatory sentencing are: (1) identify the aggravating factors; and (2) apply the time limitations for the aggravating factors.

Quezada’s petition argues that RCW 46.61.5055(12) “does not seek to define ‘prior;’ “ PFR at 10. The legislature undeniably defined the term “prior offense” in RCW 46.61.5055(12). See e.g. RCW 46.61.520(2) (“an additional two years shall be added to the sentence for each prior offense as defined in RCW 46.61.5055”). This court previously stated this same conclusion. *City of Walla Walla v. Greene*, 154 Wn.2d 722, 724, 116 P.3d 1008 (2005) (“This case involves a constitutional challenge to RCW 46.61.5055(12)(a)(v), which defines “prior offenses” that increase mandatory minimum sentences for certain driving under the influence

(DUI) convictions”). Because the legislature defines and uses only that precise term throughout the statute, Quezada’s argument is quite bizarre. It would be non-sense for the legislature to separately define the word “prior” when it defined and exclusively relied upon the specific term “prior offense.” Quezada offers no authority for his entirely novel claim that the individual words in a defined term are “undefined” for purposes of plain meaning analysis. The purpose of a legislative definition is to eliminate ambiguity by precisely defining the legislature’s intent. Extracting a word from the defined term and redefining it with a dictionary is simply a parlor trick for inserting ambiguity back into the statute. The attempt to redefine “prior offense” by carving it into pieces should be rejected. Accordingly, the legislature term “prior offense” includes each specific offense listed in RCW 46.61.5055(12).

Having established that a defined term cannot be parsed into ambiguity, the legislative choice for selecting the exact phrase “prior offense” as the representative term in the statute is reduced to mere curiosity. To the extent the curious inquire why the legislature would use the word “prior” in “prior offense,” rather than simply “offense,” there are certainly many alternative terms they could have used. RCW 46.61.5055(12) could have used “mandatory offenses” or “aggravating offenses” or “sentencing enhancers” or any other of a variety of general terms. The point of the defined term is to act as a place-holder

for the exact definition. When we read the term, we know it is actually only a substitute for the exact definition. Any term generally conveying the idea encompassed in the definition will suffice as its proxy.

The selection of the phrase “prior offense” makes sense as the proxy because the legislature’s mandatory sentencing scheme does not include the offense for which the DUI defendant is actually being sentenced. “Prior offense” generally refers to the fact that the court only considers proof of the DUI convict’s other offenses *prior* to this specific sentencing. Accordingly, a DUI convict at his DUI sentencing with no criminal history except this initial DUI has a zero score because no other incidents of DUI are proven. Based upon the mandatory sentencing scheme developed by the legislature, the general term “prior offenses” makes sense.

B. The court of appeals correctly concluded that “within seven years” is plainly understood and their interpretation is supported by related statutes and plain meaning analysis.

If our analysis ended here, every “prior offense” listed in the mandatory sentencing statute would be included in mandatory sentencing. But, in addition to inclusion within the list as a “prior offense,” the conviction or DP must be “within seven years.” “Within seven years” means that “the arrest for a prior offense occurred within seven years of the arrest for the current offense.” RCW 46.61.5055(12)(b). As explained

by the court of appeals, the term “within seven years” is plainly understood.

The term “within” from the definition in the DUI sentencing statute commonly means “inside the limits or extent in time, degree, or distance,” The American Heritage Dictionary of the English Language (4th Ed. 2004). The lone court who considered this issue also concludes that “within” means anytime before, during, or after a specified time period. Glenn v. Garrett, 84 S.W.2d 515, 516 (Tex. Civ. App. 1935). Applying those meanings herein, “within seven years of the arrest for the current offense” plainly means we include convictions for DUI crimes that occur either before or after the arrest.

We construe legislative terms in conjunction with other related statutes. State v. Jacobs, 154 Wn.2d 596, 115 P.3d 281 (2005). RCW 10.05.100 requires revocation of a DP upon subsequent conviction for any “similar offense.” A DUI arrest that results in a Reckless Driving plea is a similar offense. RCW 46.61.5055(12)(a). Both Quezada and Winebrenner ran afoul of the mandatory revocation rule and had their DP revoked. Despite the mandatory revocation, both defendants insist the legislature did not intend that their DUI sentence include consideration of the DUI offense that forced their sentencing. Not only is their argument an absurd construction of both statutes, they are demonstrably incorrect under a third statute.

RCW 46.61.513 governs the procedure before the sentencing court orders a sentence in a DUI. RCW 46.61.513(1), (3) direct the DUI sentencing court to enter findings on the DUI defendant's criminal history immediately before sentencing and expressly states, "the criminal history shall include *all previous convictions* and orders of deferred prosecution, as reported through the judicial information system...current to within [one day] before the date of the order." (emphasis added). Contrary to their argument, the legislature *expressly* instructs DUI sentencing courts to consider Quezada's and Winebrenner's convictions for Reckless Driving. Quezada's argument that the sentencing court is limited to only a portion of his convictions is nonsense.

Quezada suggests that when the legislature used the word "within" they really meant "before." Under well established plain meaning analysis, the legislature understands the dramatic difference between "within seven years of arrest" and "within seven years *before* arrest" because we presume the legislature means exactly what it says. See State v. Chapman, 140 Wn.2d 436, 450, 998 P.2d 282 (2000) ("If the language of a statute is clear on its face, courts must give effect to its plain meaning and should assume the Legislature means exactly what it says ... A statute that is clear on its face is not subject to judicial interpretation.").

Quezada's interpretation also fails because the legislature previously rejected his sentencing method. In 1994 the DUI sentencing

statute stated, "A person...who has not been convicted of a violation of [DUI or Physical Control] that was committed within five years before the commission of the current violation... ." Laws of 1994, Ch. 275, § 3. This prior version of the DUI sentencing statute expressly limited prior offenses to those committed *before* the arrest for the current crime by including the word "before" in the statute. The 1995 amended statute states, "A person who is convicted of [DUI or Physical Control] that was committed within five years shall be punished... ." Laws of 1995, 1st Special Session Ch. 17, §1. The 1995 legislature struck the "*before the commission of the current crime*" from the revised DUI sentencing statute and expanded the list of acts triggering mandatory sentencing enhancements.

Quezada's unsupported argument is, essentially, that the 1995 legislature did not intend to expand the scope of eligible convictions when it purposely deleted the 1994 "before the commission of the current crime" phrase from the DUI sentencing statute. The argument is ludicrous. When the legislature changes the language of an unambiguous statute, the legislature is presumed to intend to change the law. In re Bale, 63 Wn.2d 83, 89, 385 P.2d 545 (1963); State v. Carlson, 65 Wn. App. 153, 158, 828 P.2d 30, rev. denied, 119 Wn.2d 1022 (1992). Accordingly, the current defined term "within seven years" cannot reasonably be

interpreted to mean “*before the commission of the current crime*” when the legislature specifically struck that language from the statute in 1995.

C. The court of appeals’ interpretation is not inequitable to the defendants herein and hypothetical inequities are avoidable.

In his petition, Quezada complains, “Under the court of appeals’ strained interpretation of the sentencing statutes, instead of a first and a second offense, as the law dictates, the court is required to impose much harsher penalties by treating both offenses as a second offense.” PFR at 5. To be clear, Quezada does not claim *his* sentence was inequitable under the court of appeals’ interpretation of RCW 46.61.5055. Instead, Quezada relies upon a hypothetical to illustrate the possibility of an inequitable result in some other case. But even though Quezada claims no inequity in his own case from the court of appeal’s interpretation, Quezada still reaps benefits from the loop-hole he proposes. Quezada’s claim of a hypothetical sentencing inequity is not borne out and his alternative interpretation creates new inequities to favor of DUI defendants.

Under RCW 46.61.5055, the legislature identified proof of specific facts that mandate specific minimum DUI sentences. Quezada attacks the court of appeal’s plain meaning interpretation of RCW 46.61.5055 largely because it offends his own sense of equity. Quezada repeatedly asserts “legislative intent” as the basis for his inequity claim, but he fails to cite any authority in support of his “legislative intent” theory.

At the onset note that the statute increases penalties based upon proof of certain facts at sentencing. Under this sentencing paradigm, the order in which convictions and grants of deferred prosecution are entered is important. Thus, the timing of related events is a factor at sentencing. For example, Quezada scripts a hypothetical in his petition for review where a defendant is arrested for DUI in 2000 and is granted a DP for that arrest. In 2004, that same defendant is convicted of a new DUI. Based upon the fact of his 2004 DUI conviction, the defendant's DP for DUI is revoked and he is also later convicted of DUI for the 2000 arrest. Because the defendant's score for both DUI convictions includes a "prior offense" for mandatory minimum sentencing, Quezada insists the court of appeals interpretation is inequitable.

First, we challenge Quezada's notion of "equity." The legislature decides punishment. State v. Freeman, 153 Wn.2d 765, 771, 108 P.3d 753 (2005). The legislature concluded that the prior grant of a DP for DUI merits a higher sentence at a DUI sentencing. Nothing within the legislature suggests its intention to create a "right" to a first offense after a defendant is granted a deferred prosecution, as Quezada argues. In general, repetition of criminal conduct justifies heavier penalties for each repeated crime. Wahleithner v. Thompson, 134 Wn.App. 931, 940, 143 P.3d 321 (2006), citing State v. Lee, 87 Wn.2d 932, 937, 558 P.2d 236 (1976). If the legislature intended that grant of a DP for a DUI would only

enhance the mandatory sentence in certain circumstances, they could certainly have done so. See e.g. City of Bremerton v. Tucker, 126 Wn.App. 26, 34, 103 P.3d 1285 (2005) (“The [Jenkins] court held that the Legislature meant exactly what it said: It intended that a successfully completed, deferred prosecution should count as a prior offense for sentencing purposes in a subsequent DUI offense.”) The legislature had no difficulty stating that RCW 46.61.5055 only applies to DUI sentencing, specifically excluding DUI arrests reduced to Reckless Driving and Negligent Driving. Merely because Quezada does not like the balance the legislature enacted in RCW 46.61.5055 does not leave it open to alteration by a claim of “inequity.” See State v. Maybury, 161 Wash. 142, 146, 296 P. 566 (1931).

Second, what Quezada calls “inequity” in his hypothetical might better be labeled “malpractice.” With a minimum of effort, the defense could easily avoid any negative impact in his hypothetical without attempting to rewrite the DUI sentencing statute. As we have stated, *when* a conviction is entered matters. To avoid a two “second offense” result, the defense need only reduce the 2000 DP to a DUI conviction and be sentenced upon that before sentencing on his 2004 DUI. If he did that, his score for the 2000 DUI includes zero prior offenses. When the defendant is later sentenced for the 2004 DUI, the court considers the 2000 DUI conviction and the defendant’s score includes a single prior offense.

Quezada cannot insist his hypothetical demonstrates inequity in the court of appeal's interpretation when any inequity is easily avoided. At best Quezada's hypothetical merely highlights that sentencing, just as everywhere else, requires planning to avoid negative results.

On the other hand, adopting Quezada's contrary interpretation leads to irreparable inequities. Under Quezada's interpretation, we consider only those arrests that arose before the arrest in our own DUI sentencing—ignoring later arrests and convictions. By simply disposing of their DUI cases in reverse chronology, the DUI defendant evades any enhancements for repeat offenses. The loop-hole rewards the worst DUI offenders, contrary to the express purpose of the statute, to harshly punish recidivists. In attempting to improve his own situation, where no inequity arose, Quezada would have the court insert a massive loop-hole in the DUI sentencing statute.

Finally, Quezada argues that a sentencing court could exercise its discretion by simply imposing more jail to "correct" the reverse-order loop-hole his interpretation spawns. PFR at 15. This, of course, defeats the entire purpose of mandatory sentencing. If the legislature believed DUI discretionary sentencing adequately deterred and punished drunk driving, mandatory DUI sentencing would not exist. Substituting discretionary sentencing for mandatory sentencing is not an equitable remedy for side-stepping mandatory sentencing.

D. The 2007 revision to the DUI sentencing statute compelling felony sentencing after four prior offenses is irrelevant to any issue before the court.

Quezada's newest attack upon the court of appeals' interpretation of RCW 46.61.5055 is his claim that it creates a sentencing scheme that is "impossible to effectuate." RFP at 13. He argues RCW 46.61.5055(4)¹ requires the imposition of a felony sentence if the defendant has four prior offenses. Quezada then engineers a hypothetical in which the DUI defendant obtains three DUI convictions, is granted a DP for DUI in municipal court, and is later convicted of a later DUI in Superior Court. When the DP for DUI in municipal court is revoked and the defendant is sentenced, Quezada insists the municipal court is "required to impose a felony sentence." Id. at 14. His argument is an apples and orangutans comparison.

First, the new felony provisions for DUI sentencing took effect in July 2007. Accordingly, they have nothing to do with Quezada, his case, his prior briefing, or the statute in effect when he was arrested and convicted.

Second, the 2007 sentencing revisions are irrelevant to any interpretation issue herein. The new issue Quezada raises is whether the

¹ RCW 46.61.5055(4) - A person who is convicted of a violation of RCW 46.61.502 or 46.61.504 and who has four or more prior offenses within ten years, or who has ever previously been convicted of a violation of RCW 46.61.520 committed while under the influence of intoxicating liquor or any drug or RCW committed while under the influence of intoxicating liquor or any drug, shall be punished in accordance with Chapter 9.94A RCW.

2007 revisions direct courts of limited jurisdiction to impose felony sentencing after a fourth DUI conviction in ten years, and whether a court of limited jurisdiction has that authority. But these issues exist by virtue of the 2007 amendments for punishment, not the competing interpretations at issue herein for determining which “prior offenses” are included in the scoring. Whether we interpret RCW 46.61.5055 consistent with the court of appeals’ opinion or we interpret it as Quezada insists—the separate sentencing issue he now raises from the July 2007 DUI sentencing statute is not resolved.

Quezada poses a hypothetical in his petition. In it he applies the court of appeals’ reasoning to it implying the lower courts’ interpretation *causes* the flaw he now raises in the 2007 amendments. But that same flaw is also evident under Quezada’s competing interpretation. For example: A DUI defendant has four DUI convictions in municipal court and then gets a fifth conviction after those first four DUI convictions. According to Quezada’s interpretation the municipal court must count the four convictions because they all arose before the arrest for his latest DUI. According to Quezada, the 2007 revisions force the court of limited jurisdiction to sentence the defendant to a felony term—but cannot. Quezada’s interpretation fares no better than the court of appeals’ interpretation of the DUI sentencing statute in light of the 2007 sentencing statute. In sum, if the 2007 revisions to RCW 46.61.5055(4) create a

sentencing issue, its existence does nothing to undermine the court of appeals' opinion below or support Quezada's interpretation herein. Because the 2007 revisions do not affect our analysis, they are irrelevant to any issue herein.

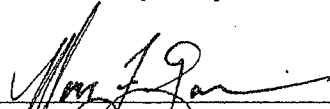
II. CONCLUSION

We respectfully request the court affirm the court of appeals and remand for sentencing.

Dated this 10th day of October, 2008.

Respectfully,

Stafford Frey Cooper



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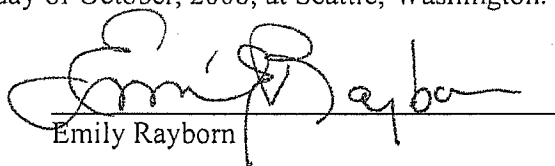
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Supreme Court No. 81280-2

Attached is The City of Seattle's Supplemental Brief, to be filed. The original of this document will be held in our file.

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